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CONCORD, N.H.

Honorable Manning H. Philbrick
Representative from Rye
House of Representatives
State House
Concord, New Hampshire

Dear Mr. Philbrick:

You have inquired as to my opinion respecting a proposed amendment to Senate Bill No. 102 concerning the Rye Water District whereby it is proposed to amend section 1 of said bill by inserting the word "exclusive" before the words "right and privilege." With this insertion the district will be given by the section "the exclusive right and privilege of taking water from any surface or subterranean water supply" within a defined area in the Town of Rye. It is my opinion that there is no constitutional conflict by the giving of such an exclusive right and privilege.

The exclusive right and privilege being conferred upon the district is for the "taking" of water. When used in conjunction with the right of a governmental body or agency to acquire property rights, the word "taking" has a legal connotation of acquisition through the exercise of the right of eminent domain. See Eaton v. Railroad, 51 N.H. 504; Littleton v. Berlin Mills Company, 73 N.H. 11; Langdon v. Interstate Bridge, 92 N.H. 432.

The paramount right of eminent domain is bestowed upon the Legislature by Article XII, Part First, of our Constitution. This right lies dormant until legislative action is had determining the occasion, mode, the conditions and the agencies for its exercise. Jahr, Eminent Domain, s. 14. When delegating this power to any governmental subdivision, the Legislature may in its discretion impose such terms and conditions as it desires so long as the rights of individual property owners to just compensation are not abridged. Thus, when conferring the right of eminent domain upon one subdivision, it may make this right exclusive for a designated territory and thereby withhold the right for this territory from any other subdivision.

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This type of restriction would affect only other agencies which would not be able to take property in the area. It does not affect any rights of individual property owners and it does not restrict their use or disposition of their rights at the time the exclusive power is given to the agency. It is true that all the specified property rights within the area are subject to the ultimate and exclusive right of the water district to condemn and take by eminent domain but when this right is exercised, the then owner is assured of obtaining proper and just compensation subject to judicial review.

If doubt is thought to exist as to the type of right being conferred upon the district, the language such as is found in section 13 of chapter 56 of the Revised Laws could be substituted for the word "taking." I refer to the phrase as found in the above mentioned section, "take by eminent domain."

It has been called to my attention that there is some doubt whether the Rye Water District would have the necessary statutory power to exercise the exclusive right and privilege as contained in the proposed amendment to Senate Bill No. 102 if enacted. Because of this doubt I feel that I should call this to your attention and mention the possibility of need for amendment to chapter 56 of the Revised Laws.

Without setting forth here in great detail the legislative history respecting municipal water systems, I should like to point out that prior to 1937 appropriate provisions for municipal water works and municipal lighting systems were contained in two separate chapters. See chapters 43 and 44 of the Public Laws. In 1937, by chapter 148 of the laws thereof, said chapter 43 was repealed and many provisions thereof incorporated by amendment into said chapter 44. The appropriate provisions are now found in chapter 56 of the Revised Laws.

I call your attention to section 13 of said chapter 56 which gives to a municipality the right of eminent domain within its limits. Municipality as defined by section 2 is any city, town or village district. By the provisions of said section 13 it is clear that the right to take by eminent domain land or water rights is limited to the territorial limits of the district. If this general section controls the right of the Rye Water District with respect to eminent domain, it is, in the least, questionable whether the right sought to be given by Senate Bill No. 102 could be properly exercised as I understand the area defined in the Senate Bill is outside the territorial limits of the district.

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As bearing upon this problem I would call your attention also to chapter 70 of the Revised Laws. By section 1 thereof a village district is defined as one established for the purposes of supplying water for domestic and fire uses. Section 17 of said chapter gives to a district, within the meaning of the chapter, the right to take any land or easement in land required by it for its purposes. This section is much broader than the aforementioned section 13 of chapter 56 and would seem to authorize a district such as the Rye Water District to exercise its conferred rights of eminent domain beyond its own territorial limits. However, it may be that the more extensive right in section 17, when applied to water districts, would have to be read in conjunction with the specific chapter and provisions therein concerning municipal water districts and systems and thus be limited by the language of the aforementioned section 13.

In order to clarify the doubt as to the proper application of the two sections it may be that an amendment to section 13 of chapter 56 is proper and desirable so that the territorial limitation as contained therein is made coextensive with that of section 17 of chapter 70, or at least broadened so as to include an entire town in which the district is limited.

Very truly yours,

Richard C. Duncan
Assistant Attorney General

RCD/eml

cc: Honorable Robert W. Upton
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